

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VASEL DJONAJ,

Defendant-Appellant.

UNPUBLISHED

January 22, 2009

No. 280294

Oakland Circuit Court

LC No. 2007-212531-FH

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i, and sentenced to 1½ to 5 years' imprisonment. He appeals as of right. We affirm defendant's conviction, but vacate the judgment of sentence and remand for resentencing.

Defendant first argues that the prosecutor engaged in multiple instances of misconduct that deprived him of a fair trial. We disagree. In *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007), this Court set forth the general principles regarding a claim of prosecutorial misconduct:

Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. "The propriety of a prosecutor's remarks depends on all the facts of the case." A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. [Citations omitted.]

Some of the claims of misconduct were preserved and others were not. This Court reviews defendant's unpreserved claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain-error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, and (3) the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* Moreover, even after these three requirements are satisfied, reversal is

unwarranted unless the error resulted in the conviction of an actually innocent defendant or seriously compromised the fairness, integrity, or public reputation of the judicial proceedings independent of the question concerning the defendant's innocence. *Id.* With respect to preserved issues, it still must be shown that the error was not harmless and that the defendant incurred prejudice as a result of the error before reversal is warranted. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

First, defendant argues that the prosecutor engaged in misconduct when he argued facts not in evidence by remarking that the victim was reluctant to testify because she was afraid of defendant's family. A prosecutor may not make a factual statement to the jury that is unsupported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to the prosecutor's theory of the case. *Dobek, supra* at 66. Indeed, the prosecution has wide latitude in arguing the facts and reasonable inferences and need not confine arguments, comments, and remarks to the blandest of all terms. *Id.* Here, even though the victim testified that she failed to appear on the original trial date because of pressure from the Albanian community without specifically referring to defendant's family, there was testimony that defendant's wife placed two harassing telephone calls to the victim. It could reasonably be inferred that the harassing phone calls played a role in the victim's hesitancy in appearing. But even if the prosecutor's comment went beyond what could be considered a reasonable inference drawn from the testimony, any misconduct was harmless, and the jury was instructed that the attorneys' arguments were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The prosecution presented clear, strong, and compelling evidence showing defendant's stalking activities and defendant himself made conflicting statements to the police, continually changing his story until conceding that he loved the victim and found her to be beautiful. Reversal is unwarranted.

Next, defendant argues that the prosecutor engaged in misconduct during his cross-examination of defendant by repeatedly asking him to comment on the credibility of three police officers and then further committed misconduct by referring to defendant's responses to the inquiries during closing arguments. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *Dobek, supra* at 71. Given the strength of the prosecution's case and the fact that the only reasonable conclusion that could be drawn by the jurors from the conflicting testimony was that defendant was of the position that the police officers were lying, even absent an express statement to that effect, any misconduct was harmless. Reversal is unwarranted. See *People v Knapp*, 244 Mich App 361, 384-385; 624 NW2d 227 (2001)(eliciting testimony from a defendant that another witness was a liar did not warrant reversal in light of the defense theory that other individuals were lying, the failure to show any harm by the elicitation, and because any undue prejudice could have been cured by a timely objection and curative instruction).

Next, defendant argues that the prosecutor engaged in misconduct by urging the jury to consider MRE 404(b) evidence for improper purposes. During his opening statement, the prosecutor stated that "Vasel Djonaj is a stalker. . . . He stalks her over, and over, and over. This goes back about 10 years." Then, during his closing argument, the prosecutor stated that "[w]e had to get her [the victim] here . . . so that we could prosecute him for his decade of abuse." The

prosecutor also vigorously cross-examined a defense witness, defendant's son, about prior bad acts committed by defendant. Defendant acknowledges that the trial court allowed evidence of prior bad acts for purposes of establishing intent, absence of mistake, the *res gestae*, and a common scheme or plan employed by defendant against the victim. And defendant does not challenge that ruling. The evidence could not be used to prove defendant's character or his propensity to commit the charged crime, *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), and defendant's argument is that the prosecutor went beyond the court's evidentiary ruling and touched on character and propensity. However, we do not believe that the prosecutor's comments and questioning constituted misconduct or denied defendant a fair trial. The comments and questioning were fairly predicated on admissible MRE 404(b) evidence. Additionally, the cross-examination of defendant's son regarding certain events was a proper attack on his credibility with respect to claims that defendant struggled with the English language. To the extent that the prosecutor's remarks were out of bounds, there was no prejudice given that the evidence of prior bad acts was admissible, that the evidence against defendant was overwhelming, and that the trial court gave the jury limiting instructions concerning the proper use of the MRE 404(b) evidence.

Next, defendant argues that the prosecutor engaged in misconduct during his rebuttal closing argument by denigrating defense counsel for arguing "lawyer issues," "side issues," and issues that "have nothing to do with what's important in this case." The prosecutor's comments were not denigrations of defense counsel, but rather, permissible arguments that counsel was focusing on irrelevant issues and not issues pertinent to guilt or innocence. See *Dobek, supra* at 67 (comments suggesting that defense counsel was trying to distract the jury from the truth were properly made in response to defense counsel's suggestion that the prosecution failed to recognize allegedly problematic evidence); *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001) (rejecting the defendant's claim that reversal was warranted on the basis of "red herring" statements made by the prosecutor); *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996) (holding that the prosecutor's remark that defense counsel was trying to "confuse the issue" did not constitute a personal attack of defense counsel or shift the jury's focus from the evidence to defense counsel's personality, and thus, was proper).

Next, defendant argues that the prosecutor committed misconduct during his closing argument by improperly vouching for the credibility of the officers who testified for the prosecution and by relying on the prestige of his office to bolster his case. The prosecutor remarked that the officers had no reason to lie; they were just doing their job and it was absurd to believe that they were lying. A prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). But a prosecutor may comment on his own witnesses' credibility and worthiness of belief during closing argument on the basis of the evidence presented during trial, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Dobek, supra* at 66; *Thomas, supra* at 455. Here, the prosecutor was not implying that he had some special knowledge of the truthfulness of the police officers. He merely argued that they had no reason to lie. The prosecutor's comments were proper, especially in light of the fact that there was conflicting evidence and the question of defendant's guilt depended on which witnesses the jury believed. Further alleviating any potential for prejudice, the trial court instructed the jury that it was up to it to determine which witnesses to believe and that the testimony of police officers was to be

judged by the same standards applicable to any other witness. Moreover, defendant cannot support his argument that the prosecutor relied on the prestige of his office to bolster the case.

Finally, defendant argues that the prosecutor engaged in misconduct during his closing argument by attempting to evoke an emotional response by appealing to the jury's sympathy for the victim and by appealing to its sense of civic duty. A prosecutor may not seek a juror's sympathy for a victim, *Dobek*, *supra* at 80, nor may the prosecution argue that the jury should convict a defendant out of civic duty, *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). Assuming any improper commentary by the prosecutor as alleged by defendant, we fail to see how defendant was prejudiced given the evidence of guilt, the briefness of the comments, a curative instruction, and the fairly innocuous nature of the remarks.

In sum, defendant cannot establish that the instances of alleged prosecutorial misconduct, either singularly or cumulatively, denied him a fair trial or prejudiced him. Accordingly, reversal is unwarranted.

Next, defendant argues that the trial court lacked substantial and compelling reasons to depart from the guidelines. We agree.

The sentencing guidelines range for defendant's conviction was zero to 11 months. MCL 769.34(4)(a) provides:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

The trial court thus departed from the guidelines when it sentenced defendant to 1½ to 5 years' imprisonment with the department of corrections. The basis for the departure was the trial court's conclusion that defendant lied when testifying at trial, completely denying any wrongful conduct and thereby committing perjury.

We review for clear error a trial court's stated reasons for departing from the sentencing guidelines, and its conclusion that such a reason is objective and verifiable is reviewed de novo as a question of law. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The amount of the departure and whether the stated reasons are substantial and compelling are reviewed for an abuse of discretion. *Id.* "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

The legislative sentencing guidelines apply to convictions for felonies committed after January 1, 1999. MCL 769.34(2). A trial court must impose a sentence within the range

recommended by the guidelines and may depart from the guidelines recommendation only if it states on the record a substantial and compelling reason for the departure. MCL 769.34(3); *Babcock, supra* at 258. “[T]he substantial and compelling reason . . . must also be objective and verifiable, must keenly or irresistibly grab our attention, and must be of considerable worth in deciding the length of a sentence.” *People v Solmonson*, 261 Mich App 657, 668; 683 NW2d 761 (2004). In addition, a substantial and compelling reason is one that exists only in exceptional cases. *Babcock, supra* at 258. The trial court may not base a departure on an offense or offender characteristic already taken into account in the scoring of the guidelines unless it finds that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock, supra* at 258 n 12. Finally, “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *Smith, supra* at 303 (emphasis in original). Accordingly, a trial court that departs from the guidelines “must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Id.* at 304. We may not substitute any reasons of our own to support a departure. *Id.* at 318.

In *People v Kahley*, 277 Mich App 182, 188; 744 NW2d 194 (2007), this Court stated:

Defendant's perjury was an objective and verifiable factor under the circumstances presented in this case. We recognize that whether a person perjured himself or herself at trial may on some occasions be a subjective conclusion, i.e., an internal belief that the person was lying without a firm confirmation. However, defendant admitted at his sentencing that he lied to the jury and that he committed the offenses. Accordingly, the perjury factor as found by the trial court was objective and verifiable. But, by itself, this would be insufficient to constitute a substantial and compelling reason for departure from the guidelines; otherwise, a departure might be warranted every time a defendant testified and was found guilty.

Here, there was no absolute confirmation of the perjury as in *Kahley* and perjury formed the only basis for the court's departure. Earlier comments by the trial court regarding the egregious nature of the case, the pattern of reprehensible conduct, and the resulting trauma to the terrified victim were not made in the context of the court's articulation of substantial and compelling reasons for departure. We are not permitted to speculate about conceivable reasons for departure not expressly articulated by the court as a basis for departure. *Smith, supra* at 318. *Kahley* requires resentencing. In fairness to the trial court, *Kahley* was issued several months after the sentencing hearing. The trial court's reliance on *People v Adams*, 430 Mich 679; 425 NW2d 437 (1988), was misplaced, where *Adams* was decided before enactment of the applicable legislative sentencing guidelines, it did not involve issues concerning the prerequisites for a sentencing departure, and *Adams* did not even entail a departure under the judicial sentencing guidelines. Defendant is entitled to resentencing.

In light of our conclusion, there is no need to reach defendant's remaining sentencing arguments.¹ On remand, the trial court is free to once again depart from the guidelines;

¹ We do note that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004),
(continued...)

however, if it chooses to do so, the court must abide by the requirements set forth in MCL 769.34, the ruling in *Kahley*, and this opinion. Moreover, the trial court must heed and pay special attention to our Supreme Court's most recent pronouncements on guideline departures as enunciated in *Smith, supra*, especially the summary outlining the proper procedure, *id.* at 317-318.

Defendant's conviction is affirmed, but his sentence is vacated. We remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

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and its progeny have no application under Michigan's sentencing scheme. *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006).